

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE D. BANUELOS
Claimant

VS.

IBP, INC.
Respondent
Self-Insured

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Docket No. 220,551

ORDER

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge Kenneth S. Johnson on August 15, 1997. The Order required respondent to provide claimant with medical treatment.

ISSUES

Respondent contends the Order by the Administrative Law Judge exceeded his jurisdiction because: (1) claimant did not give timely notice as required by K.S.A. 44-520; and, (2) did not establish that the injury arose out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Order granting medical treatment should be affirmed.

Claimant testified he began experiencing pain in his back on August 26, 1996, while performing his work, pulling meat, and that he reported the problem that day to Ramone Castro. According to claimant, Mr. Castro took him immediately to the plant nurse.

Respondent contends claimant did not notify respondent until September 12, 1996, and offers as evidence of that notice the nurse's record of a first-reported injury for September 12, 1996. Claimant has testified that the plant nurse took notes when he first

visited and further testified that, if those notes showed it was September 12, he would not disagree with that. This evidence might suggest that claimant was simply confused about the date of accident. The nurse's records are not, however, consistent with that assumption. The record of the first visit, dated September 12, 1996, shows claimant gave a history at that time of an injury on August 26, 1996.

On the other hand, claimant's testimony is, otherwise, consistent with the August 26, 1996, injury reported here. He states that he was not initially referred to a physician but was put on light duty. Claimant testified that he was not sent to a doctor for approximately two weeks after going back to the plant nurse. The records show that he was, in fact, referred to Myron J. Zeller, M.D., for the first time on September 13, 1996. With this somewhat confusing evidence, the Appeals Board has chosen to affirm the decision by the Administrative Law Judge, in part, deferring to his opportunity to observe the testimony of claimant. The nurse's report of injury is offered into evidence without supporting testimony from the nurse. Claimant has given rather specific and clear testimony about reporting the injury. The Appeals Board, therefore, affirms the decision by the Administrative Law Judge finding that claimant did give notice as required by K.S.A. 44-520.

The Appeals Board also finds that claimant has established an injury arising out of and in the course of his employment. The evidence shows claimant suffers from an avulsion fracture of the spinous process of T2. The medical reports and records indicate Gary M. Kramer, M.D., could not say how the fracture occurred, and Dr. Zeller could not state to a degree of medical certainty it was caused by claimant's employment. Edward J. Prostic, M.D., on the other hand, attributes the injury to claimant's employment. The Appeals Board finds that this evidence, coupled with claimant's testimony regarding the onset of symptoms, establishes claimant's injury most likely arose out of and in the course of his employment.

WHEREFORE, the Appeals Board finds that the Order by Administrative Law Judge Kenneth S. Johnson, dated August 15, 1997, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS
Craig A. Posson, Dakota City, NE
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director